

ROBERT B. WOODING
v.
AREA DIRECTOR, PORTLAND AREA OFFICE,
BUREAU OF INDIAN AFFAIRS

IBIA 80-45-A

Decided January 26, 1982

Appeal from decision adjusting annual rental rate on lease of trust property on the Muckleshoot Indian Reservation in Washington State.

Reversed.

1. Indian Lands: Leases and Permits: Generally--Indian Lands:
Leases and Permits: Long-term Business/Agriculture: Rentals

Calculating the percentage increase in fee simple land values on or near the Indian reservation where leased trust property is located is, under the circumstances of this case, an acceptable method for determining the appropriate increase in rental rate.

APPEARANCES: Wallace B. Hager, Esq., for appellant Robert B. Wooding; James R. Kuhn, Jr., Esq., for appellee, Portland Area Director. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

This case is before the Board of Indian Appeals to determine the proper adjustment to the annual rental rate for lease No. 4388, covering allotment No. 7 on the Muckleshoot Indian Reservation in King County, Washington State. The Bureau of Indian Affairs (BIA) determined that the rental rate for the period beginning June 15, 1978, should be set at \$24,136. Appellant contends that at most the increase should be to approximately \$15,000 or \$16,000.

Background

Lease No. 4388 was entered into on April 27, 1964, for a period of 25 years beginning on June 15, 1964. The lease, denominated as one for commercial and residential purposes, covers approximately 116 acres on Highway 164 between Auburn and Enumclaw, Washington. According to uncontroverted testimony by a BIA appraiser, the property is divided

into several sections by the highway, distinct geologic changes, and a Bonneville Power Administration (BPA) right-of-way. A 3-acre parcel located north of the highway is level and lightly wooded. Seventeen level acres south of the highway have been developed into a mobile home court. This developed area adjoins 19 acres that are also fairly level with light woods and good drainage. The BPA's 300-foot right-of-way covers 8.6 acres and further divides the property south of the highway. Eleven acres beyond the right-of-way are lightly wooded with a steeper slope. A total of 57.4 acres on both sides of the highway is steep terrain going down to the flood plains for the Green and White Rivers (Tr. 20). Except for the mobile home court and a few Indian residences, none of the property has been improved.

In 1964 the tract was completely undeveloped except for several Indian residences. The rental rate was set at \$1,500 per year for the first 5 years of the lease. The BIA stated that this rate was below the fair annual rental, but was approved in an effort to put the undeveloped land to a beneficial use while giving the lessee a period of time in which to improve the property and begin realizing an income from it. Under clause 7 of the lease, an adjustment to the rent could be made after 5 years in accordance with regulations found in 25 CFR 131. See Robert B. Wooding v. Commissioner, Bureau of Indian Affairs, 4 IBIA 255, 260 (1975).

When BIA and the lessee were unable to agree on an adjustment for the 1969 rental rate, the lessee appealed BIA's determination, eventually reaching Federal district court. The case was remanded to the Department (Wooding v. Morton, No. 77-72C3 (W.D. Wash. Aug. 13, 1973)) and the Board of Indian Appeals held that the fair annual rental for the period beginning in 1969 was \$9,668. 1/ Robert B. Wooding, supra. The court upheld this determination. Wooding v. Kleppe, No. C-76-86T (W.D. Wash. Nov. 4, 1976).

On June 11, 1978, the Superintendent of the Western Washington Agency, BIA, 2/ informed the lessee that the annual rent was being adjusted from \$9,668 to \$24,136, effective June 15, 1978. The lessee appealed this decision to the Portland Area Director who affirmed it

1/ This figure was reached after the Board found from BIA appraisal reports and related evidence adduced at the July 1974 evidentiary hearing that the fair annual rental in 1964 was at least \$4,550 and that the rental value had increased an average of 22.5 percent per year. Hence, an increase of 22.5 percent per year for 5 years, or an aggregate increase of 112.5 percent, was multiplied by \$4,550, the fair annual rental in 1964, resulting in a rental rate of \$9,668 for the lease period commencing June 15, 1969. Robert B. Wooding, supra at 260.

2/ This agency was subsequently divided into two agencies. The Muckleshoot Reservation is now under the supervision of the Puget Sound Agency.

on August 4, 1979. The subsequent appeal to the Commissioner of Indian Affairs was referred to the Board which in turn referred it to the Hearings Division for an evidentiary hearing and a recommended decision. A hearing was held on March 30 and 31, 1981. On October 23, 1981, Administrative Law Judge Robert C. Snashall adopted appellant's figures and recommended that the adjusted rental rate be set at \$14,715. The BIA filed exceptions to this decision on November 30, 1981. For the reasons set forth below, the Board agrees with Administrative Law Judge Snashall that the Area Director's rental rate determination is too high, but reaches a different figure as the amount which should be paid by appellant for the period in question.

Discussion, Findings, and Conclusions

The issue before the Board is the proper adjusted rental rate for the period following June 15, 1978. ^{3/} The BIA presented evidence tending to establish fee simple land prices in the vicinity of the leased property in 1969 and in 1978. These land prices were compared to determine the percentage increase in land values during that time. This percentage increase was then applied to the previous \$9,668 base rental. Appellant questioned the adequacy of using the percentage increase in fee simple land values as the sole indicator of economic conditions, but did not develop an alternative analysis or methodology. ^{4/} Instead appellant's expert witness adopted the methodology used by BIA. His evidence primarily cast doubt on the credibility of BIA's sales figures and offered competing sale prices indicating a lower change in land values.

[1] Calculating the percentage increase in fee simple land values on or near the Indian reservation where leased trust property is located can serve as an acceptable method for determining the appropriate increase in rental rate, especially where, as here, there is no evidence of comparable rentals of trust land in the area or of a more accurate alternative methodology documented in the record.

^{3/} Through an apparent typographical error, the recommended decision states that the sole factual issue in this proceeding is the amount of rent to be effective "June 15, 1969." Decision at 2.

^{4/} Appellant introduced exhibit 10, allegedly a table of the urban consumer price index (CPI) compiled by the Department of Labor, Bureau of Labor Statistics, to argue that the CPI had risen only 70.6 percent between 1968 and 1977 and that this figure could have been used for determining the rental increase. Appellant presented only generalized testimony by non-experts about the CPI and laid no foundation for adopting this index as the means for determining the new rent. Appellant's expert witness did not use the change in the CPI in his calculations.

The Board notes that exhibit 10 indicates an increase of 80.1 percent through May of 1978, the month before the rental adjustment was to take effect.

The first step under this methodology is to determine the average fee simple land value in 1969. The BIA used the records of 12 sales of land occurring in close proximity to the leased property during late 1967, 1968, and early 1969 to determine average land values in the area in 1969. These sale figures had been verified in connection with other appraisals and were available in the BIA office. 5/ From these records BIA concluded that land values in this area averaged about \$2,284 per acre in 1969.

Appellant does not dispute the accuracy of any of these figures, but rather offers an alternative value. Appellant's expert witness used \$1,810 as a per acre value in his calculations based on a 1967 appraisal of the leased property done for the BIA. 6/ That appraisal opined that the fair market value of the property was \$210,000, or approximately \$1,810 per acre for 116 acres. This appraised value was not adopted in the earlier proceedings concerning this lease and was challenged by BIA in the present proceeding (Tr. 192-93). Under the circumstances, little credence can be given to the accuracy of this figure. The Board, therefore, finds that BIA's use of \$2,284 per acre as the average land value in this area in 1969 is reasonable. See Fort Berthold Land & Livestock Association v. Area Director, Aberdeen Area Office, Bureau of Indian Affairs, 8 IBIA 230, 246-47, 88 I.D. 315, 324 (1981).

The second step is to determine the average fee simple land value in 1978. The BIA used the available records on seven land sales in 1976 and 1977 to determine that the average land value in 1978 was \$5,702 per acre. 7/ Two of the figures used by BIA, however, are unreliable. First, sale six indicates a sale for \$7,800 per acre. At the hearing the BIA witnesses stated that this figure was incorrect and should instead be \$5,280 per acre. 8/ The Board accepts this revised

5/ The sales figures per acre were: Sale 1--\$1,620; sale 2--\$1,009; sale 3--\$2,000; sale 4--\$2,176; sale 5--\$1,890; sale 6--\$850; sale 7--\$2,260; sale 8--\$4,340; sale 9--\$3,600; sale 10--\$4,460; sale 11--\$1,100; and sale 12--\$2,100. See Exh. 4, table I; Tr. 98.

6/ Because only the front page of this report appears in the record, none of the appraiser's calculations or evaluation is available. The summary sheet states the appraiser's opinion that as of Nov. 16, 1967, the fair market value of the leased property was \$210,000, and the fair annual rental was \$16,800. See Exh. G-1.

7/ These sales figures per acre were: Sale 1--\$2,000; sale 2--\$3,514; sale 3--\$2,648; sale 4--\$15,418; sale 5--\$3,535; sale 6--\$7,800; and sale 7--\$5,000. See Exh. 4, table II.

8/ Sale 6 in exhibit 4 is the same transaction as sale 2 in exhibit 3. See Tr. 44. The BIA witnesses testified that this transaction actually involved the sale of 69 improved lots on 16.7 acres. As is indicated in exhibit 3, \$450,000 of the \$538,200 total purchase price was to cover previously incurred development costs of the 69 lots and \$88,200 was for 16.7 acres of land. This indicates a per acre price of \$5,280. See Tr. 28, 62-4, 83-4, 99-100, 135.

figure. Second, sale seven shows a transaction in which the purchase price was \$5,000 per acre. This sale involved 40 acres of land sold for \$50,000. The BIA believed, however, that only 10 acres were useable and ascribed the entire purchase price to those 10 acres. ^{9/} The Board does not accept this procedure and reduces the per acre value of this sale to \$1,250 by attributing the purchase price to the entire acreage involved.

Furthermore, appellant questions the use of sales four and six on the grounds that these sales were allegedly in development corridors of an urban area and were, therefore, not comparable to the leased property. This argument attempts to exclude the two highest figures from consideration. The Board has previously indicated that the mere fact that some comparables used in determining values are higher than others is insufficient to exclude them. See Fort Berthold Land & Livestock Association, supra; Norman R. Byrd v. Commissioner, Bureau of Indian Affairs, 7 IBIA 142 (1979), rev'd on other grounds sub nom. Bryd v. Andrus, No. C-79-229 (E.D. Wash. Oct. 16, 1981). The two challenged sales were within close proximity to the leased property. The methodology employed by BIA and adopted by appellant is intended to provide evidence of fee simple land values in the area. Identity of use under this methodology is not a requirement. Appellant's argument that these two sales should be excluded is therefore rejected.

The Board thus finds that some of the sales figures used by BIA in determining 1978 land values were incorrectly calculated and therefore not supported by substantial evidence. See Fort Berthold Land & Livestock Association, supra, 8 IBIA at 246-47, 88 I.D. at 324. As corrected in accordance with the preceding discussion, BIA's sales figures reflect that in 1978 land values in the vicinity of the leased property averaged about \$4,806 per acre.

Alternatively, appellant offers evidence of nine sales within 3 miles of the leased property during late 1977, 1978, and early 1979 that indicates average land values of \$2,954 per acre. ^{10/} Of these sales, only four occurred before June 15, 1978, the date on which the rental adjustment was to take effect. ^{11/} The remaining five sales figures were, therefore, not available when BIA was determining the rental adjustment. It is inappropriate to use these figures now merely

^{9/} Sale 7 in exhibit 4 is the same transaction as sale 1 in exhibit 3. See Tr. 44. See also Tr. 25, 180-81.

^{10/} These sales figures per acre are: Sale 1--\$3,674; sale 2--\$2,297; sale 3--\$3,672; sale 4--\$3,000; sale 5--\$2,107; sale 6--\$3,394; sale 7--\$1,713; sale 8--\$2,929; and sale 9--\$3,800. See Exh. A-6.

^{11/} These are sales 2, 4, 5, and 6. See Exh. A-6.

because this proceeding has been delayed. Considering only the pre-June 15, 1978, sales figures, appellant's evidence indicates per acre land values in 1978 of \$2,700.

There is no apparent reason why appellant's four sales should not be included in the calculation of average land values in 1978. None of these sales duplicates sales used by BIA. The BIA does not contest the accuracy of appellant's figures. Using these sales helps to give a more informed picture of land sales in the vicinity of the leased property. Furthermore, appellant's sales are more recent than those used by BIA. The addition of these figures does not violate or undermine in any way the integrity of the methodology employed by BIA. By combining BIA's sales figures as corrected with appellant's four relevant sales figures, the average value of land in this area in 1978 is shown to be \$4,040 per acre.

The third step in this methodology is to determine the percentage increase in fee simple land values between 1969 and 1978. Subtracting \$2,284 (1969 value) from \$4,040 (1978 value) indicates an increase of \$1,756 per acre, or a 76.88 percent increase during the relevant period.

The fourth and final step in this methodology requires the application of the 76.88 percent increase to the base annual rental for this property of \$9,668. This calculation results in an adjusted annual rental rate of \$17,101. 12/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the

12/ Appellant argues that a business license moratorium ordered by the Muckleshoot Tribal Council on June 30, 1978, and a subsequent zoning ordinance enacted on Aug. 31, 1979, that restricted the possible uses of the leased property, should be considered to lower the annual rental. There were no restrictions on appellant's use of the leased property before or at the time the rental adjustment was announced. The mere possibility that a governmental body might restrict the potential uses of this property in the future was not a relevant consideration when the adjustment was proposed. It is only through hindsight that this eventuality could even be considered.

Similarly, appellant argues that the fact that only a few years remain under the lease should also be considered towards establishing a lower rent. The remaining term of the lease may well influence how appellant will decide to use the property. The fact that the term is short, however, cannot be used to deprive the Indian owners of a fair rental return. Appellant's investment is protected through rights guaranteed under the lease and regulations permitting removal of improvements placed on the property at the end of the lease term. See Exh. 11, clauses 2 and 15, and 25 CFR 131.9.

August 4, 1979, decision of the Portland Area Director is reversed and the adjusted rental rate for Muckleshoot Lease No. 4388 is set at \$17,101 per year commencing on June 15, 1978.

This decision is final for the Department.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Jerry Muskrat
Administrative Judge